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ABSTRACT

This chapter focuses on school desegregation litigation and attendant employment-related remedies decreed or rejected by the federal courts. The overarching remedial theory governing relief in school desegregation cases differs from that governing employment discrimination cases in that the central issue is equal educational opportunity, even where employment-related remedies are prescribed. This chapter analyzes judicial responses to three kinds of faculty employment policies that have been components of decrees designed to achieve a "unitary" school system: teacher assignment, preferential hiring, and layoff policies. Judicially mandated requirements for racially balanced faculties within each school of a defendant system were among the earliest remedies for racially segregated schools, since practices regarding faculty distribution were seen as important indicators of a segregated system. Preferential teacher hiring and promotion on the basis of race involves greater controversy and judicial uncertainty, especially since the Supreme Court has not yet provided clear guidelines for race-conscious hiring and layoff policies. Racially- or ethnically-based layoff quotas, even more than hiring quotas, pit minorities and whites in a winner-take-all contest. The chapter concludes by suggesting early and phased retirement policies as creative alternatives to the race-versus-seniority dilemma. (TE)

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Beyond the Title VII Framework: Racial Quotas and Teacher Employment Policies in School Desegregation Litigation

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THE LEGAL CONTEXT

The focus of this chapter is on school desegregation litigation and attendant employment-related remedies decreed or rejected by the federal courts. The structure of desegregation suits differs from the structure of employment discrimination suits. The overarching remedial theory governing relief in school desegregation cases also differs from the general remedial theory governing employment discrimination cases.

In employment discrimination cases brought under the fourteenth amendment,[1] and/or Title VII[2] and Title VI[3] of the Civil Rights Act of

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1. "nor [shall any State] deny to any person within its jurisdiction the equal protection of the laws."

2. 42 U.S.C. § 2000e. For an analysis of the status of seniority systems under Title VII, see Martha McCarthy's chapter in this book.

3. 42 U.S.S. § 2000d provides: "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Unlike Title VII (42 U.S.C. § 2000d-3), the country's premier employment discrimination statute, Title VI is not primarily an employment discrimination statute. What is

1964, or other statutes, plaintiffs (or a government agency suing on their behalf) seek remedies for themselves as potential, present, laid off, or discharged employees, under one of several equal employment opportunity theories.[4]

In school desegregation cases, premised primarily on the equal protection clause of the fourteenth amendment, and to a lesser extent on Title VI, and the Equal Opporunity Act of 1974,[5] The plaintiffs are minority public school children and their parents, not teachers. Minority teachers may or may not have been victims of employment discrimination. If courts should find segregated faculties within individual schools, or discrimination in the hiring of minority teachers, these factors are considered among the "important indicia of a segregated system."[6] But employment-related remedies are not designed—even in cases in which some kind of discriminatory employment policy has been identified—to make the teachers whole. Race-conscious, faculty related remedies, with or without minority preferences, are devised to vindicate the constitutional rights of minority school children. The legal theory justifying them is equal educational opportunity, never equal employment opportunity.

This chapter attempts to analyze judicial responses to three kinds of faculty employment policies that have been components of decrees designed to achieve a "unitary" school system: teacher assignment, hiring and layoff policies. The decision to address them in this sequence reflects at least two considerations. First, it reflects, in good measure, an historic development. Judicial attention turned first to assignment

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more, unlike Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, prohibiting gender discrimination in education programs, Title VI contains a provision specifically excluding employment from administrative action "except where a primary objective of Federal financial assistance is to provide employment." In spite of the fact that most teacher salaries are not primarily federally funded, it has been held, in the elementary/secondary school context, that Title VI administrative enforcement procedures do apply to teacher hiring and assignment, notwithstanding 2000d-3, when the objective of administrative action vis-a-vis teacher employment is to alleviate discrimination against students, who are the direct beneficiaries of federal financial assistance. *See, e.g.*, Caulfield v. Board of Educ. of City of New York, 632 F.2d 999 (2d Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981).

4. For an excellent discussion of competing equal employment opportunity theories *see*, G. R. LaNoue, Equal Employment Opportunity: Three Conflicting Theories (Unpublished paper prepared for the 1980 Annual Meeting of the American Society for Public Administration). LaNoue refers to them as theories of fair competition, proportional representation, and protected class reparations.

5. 20 U.S.C. § 1701. The Equal Educational Opportunity Act was enacted as part of the Educational Amendments of 1974. Section 1703d provides that "discrimination by an educational agency on the basis of race, color or national origin in the employment . . . of faculty or staff" constitutes a denial of equal educational opportunity.

6. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 18 (1971).

policies in the late sixties. Preferential minority hiring policies only entered the arsenal of equitable remedies in the middle and late seventies. Preferential layoff quotas, along with the hiring policies they were designed to protect, have become the focal point of unresolved controversy in the early eighties.[7] Second, the progression from assignment, to hiring, to layoff policies reflects a heightening of public and legal controversy as the professional stakes for affected teachers rise.

TEACHER ASSIGNMENT POLICIES

Among the earliest, and least controversial remedies for racially identifiable schools within an unconstitutionally segregated school system were judicially-mandated requirements of racially balanced faculties within each school in the defendant school system. Although these requirements were early relative to judicial orders directed at hiring and layoffs, they were not endorsed by the United States Supreme Court until fourteen years after *Brown v. Board of Education II*[8] charged lower federal courts with the duty of requiring defendant school systems to act "with all deliberate speed"[9] in dismantling their dual systems of education. In 1969, in *United States v. Montgomery Board of Education*,[10] the Supreme Court upheld the order of the district court providing that the school board "move toward a goal under which 'in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system.' "[11]

Although the Supreme Court noted that the federal goverment portrayed the lower court's assignment policy as a remedy for past assignment of teachers by race,[12] the *Montgomery* case was initiated by the United States' government to bring about "a completely unified, unitary, nondiscriminatory school system" in multiple facets of the system's operation.[13] It was not an employment discrimination case. As stated subsequently, in *Swann v. Charlotte-Mecklenburg Board of Education*[14] and other desegregation cases brought on behalf of parents and their children, policies and practices regarding faculty are among the "important indicia of a segregated system."[15] When "it is possible to identify a 'white school' or a 'Negro school' simply by reference to the

7. *See infra*, note 32 at 8.
8. 349 U.S. 294 (1955).
9. *Id.* at 301.
10. 395 U.S. 225 (1969).
11. *Id.* at 232.
12. *Id.* at 236.
13. *Id.* at 235.
14. 402 U.S. 1 (1971).
15. *Id.* at 18.

racial composition of teachers and staff," along with other variables, a prima facie case of violation of the equal protection clause is shown.[16] The Supreme Court reaffirmed the remedial equitable powers of the federal courts to correct unconstitutional race-conscious assignments of black teachers to black schools and white teachers to white schools, with an alternative race-conscious assignment policy. The *Swann* Court decreed that the ratio of white to black teachers in each school be "substantially" the same as the ratio throughout the system.[17]

Lower federal courts followed *Montgomery* and *Swann*.[18] No reference, it appears, has ever been made to any conflict between seniority and mandatory racial balance in teacher assignments. Of course segregative racial assignment policies trammel the freedom of teachers of any race to transfer voluntarily across Jim Crow's racial divide. Integrative racial assignment quotas would also place race above any seniority-acquired rights to voluntary transfers, if, in fact, the right of a teacher to select a school were a seniority-based entitlement.[19] In the context of dismantling unconstitutionally segregated schools, however, courts have consistently upheld the use of racial quotas to achieve teacher (and staff) integration.

Addressing the issue of student assignments on a color-conscious basis, in particular, and the equitable remedial power of the federal courts in general, the Supreme Court in *Swann*, firmed up the legal distinction between de jure and de facto segregation. Absent a finding of a constitutional violation, an order decreeing "that each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole," would exceed the authority of a federal court.[20] On the other hand, absent a finding of unconstitutional

16. *Id.*

17. *Id.* at 19.

18. *See, e.g.*, Nesbit v. Statesville City Bd. of Educ., 418 F.2d 1040 (4th Cir. 1969) (ratio of Negro and white faculty must be "approximately" the same, although exceptions permitted for specialized faculty positions); Singleton v. Jackson Mun. School Dist., 419 F.2d 1211 (5th Cir. 1970).

19. Kromnick v. School Dist. of Philadelphia, 555 F. Supp. 249 (E.D. Pa. 1983) appears to be the only decision in which a federal court has recognized that a seniority-acquired expectation of assignment to a particular school within a system is a legally protected interest under federal law. In this case the court held that such an expectation is a "term, condition, or privilege of employment" within the meaning of Title VII, *id.* at 256. For further discussion of *Kromnick*, *see infra* text accompanying note 26. In Caulfield v. Board of Educ. of New York, 632 F.2d 999 (2d Cir. 1980), the Second Circuit acknowledged that teachers have a limited "cognizable interest" in avoiding transfers from one school to another, *id.* at 1006, but rejected a Title VII, Title VI, and fourteenth amendment challenge to a teacher assignment quota. Citing its opinion in Rodriguez v. Board of Educ., 620 F.2d 362 (2d Cir. 1980), it confined teachers' limited cognizable interest to transfers that "constitute a serious professional setback 'and that are made for improper reasons such as sex discrimination.' " *See*, 632 F.2d at 1006, *citing*, 630 F.2d at 365-66.

20. 402 U.S. at 116.

discrimination, it remains within the broad discretionary power of school authorities to implement such a plan, if, for example, they conclude that it would help "prepare students to live in a pluralistic society. . . ."[21] Logically, then, students could not raise a constitutional challenge to such a voluntary race-conscious quota system. What of teachers? Might they claim that a school district's voluntary, or "induced" voluntary quota system,[22] designed to maintain a racially balanced faculty, rather than to remedy past segregation, violates their rights under the Constitution and Title VII? *Swann* suggests not. Under their "broad power to formulate and implement educational policy" school authorities presumably could conclude that students would be better prepared to live in a pluralistic society if exposed to teachers of different races. That is what the Ninth Circuit validated in *Zaslawsky v. Board of Education of Los Angeles City*,[23] a case initiated by teachers claiming their fourteenth amendment equal protection rights had been violated. There had been no judicial finding of de jure segregation.[24] Nevertheless, citing *Swann* the court upheld the district's faculty balance plan.[25] Thus, in an action framed by teachers as an individual rights, equal employment opportunity case, the circuit court shifted the frame of reference to a students' rights, equal educational opportunity case.

In 1983, however, in *Kromnick v. School District of Philadelphia*,[26] a district court struck down a quota system designed to maintain a racial balance in faculty assignments, rather than to remedy an imbalance. This time the teachers' claims that they had, as employees, a constitutional and Title VII right to be free of nonremedial considerations of race trumped the school district's argument that maintenance of racially balanced faculties enhanced the educational opportunities of the students.[27] Are *Zaslawsky* and

21. *Id.*

22. The term, induced voluntary, is used to refer to policies created by school districts in response to threatened administrative enforcement of Title VI.

23. 610 F.2d 661 (9th Cir. 1979).

24. Zaslawsky provides an example of induced voluntary action. The school district had acted in response to a determination by The Office for Civil Rights (then in HEW) that the Los Angeles school district's staff integration plan did not comply with Title VI. *See also*, Caulfield, 632 F.2d 999 (2d Cir. 1980).

25. 610 F.2d at 664.

26. 555 F. Supp. 249 (E.D. Pa. 1983).

27. Philadelphia initially imposed a quota system for assignments at the insistence of The Office of Civil Rights (OCR), in order to remain eligible for federal aid under the Emergency School Aid Act (ESAA), 20 U.S.C. §§ 3191-3207. ESAA, an amendment to Title VI, was repealed in 1982. Philadelphia voluntarily continued the assignment policy, in order to maintain faculty integration within each school, after OCR informed the district that its faculties were successfully integrated. What began as an induced voluntary plan thus changed to the purely voluntary plan challenged by the teachers.

Kromnick in flagrant contradiction? They do indeed read *Swann* differently; the former for the proposition that integration plans "which involve prescribed ratios can be voluntarily adopted by a school board";[28] *Kromnick* for the proposition that quota systems can only be used to remedy, not to maintain racial balance.[29] The *Kromnick* court attempted to distinguish *Zaslawsky* on grounds that the Los Angeles plan was designed to remedy past discrimination, as identified by the Office for Civil Rights (OCR),[30] whereas the Philadelphia plan post-dated an OCR finding that the city had already remedied imbalance in teacher assignments.[31] True enough; the Philadelphia plan was fully voluntary, whereas the Los Angeles plan was an "induced" voluntary one. However, if *Swann* is read to grant constitutional sanction to voluntary, as well as induced voluntary faculty assignment quotas, the nature of administrative findings, pursuant to Title VI, would be irrelevant.

PREFERENTIAL MINORITY HIRING POLICIES

It was suggested in the previous section that of the three kinds of employment policies addressed in this chapter, the least controversial are those requiring some degree of racial balance in the assignment of teachers to schools. Clearly, they are not above controversy, as exemplified by the *Kromnick* challenge, above all when race is depicted as the premier or sole personal characteristic guiding decisions affecting the professional lives of unique individuals who have, in fact, received specialized training. Still, teacher assignment quotas, like student assignment policies in elementary and secondary education, do not directly determine *whether* or not particular teachers will work. They speak to *where* members of the existing teacher corps will work. And, they apply equally to white and minority teachers alike.

In sum, while they tend to treat teachers as fungible, interchangeable parts, and are usually conceived of as a race-conscious remedy for a victimized racial group (minority students and parents) to which minority teachers qua teachers do not belong, they do not call for preferential treatment to compensate for that victimization. Like retroactive awards of seniority for actual victims of discrimination, under Title VII, they do not pit whites and minorities against each other in a winner-take-all, zero-sum contest.

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28. 610 F.2d at 664, *citing* Swann at 16.
29. 555 F. Supp. at 254, *citing* Swann in general, as well as United States Steel Workers of America v. Weber, 443 U.S. 193 (1973), for the proposition that a racial quota system must be a temporary measure designed to remedy past discrimination. Weber, however, did not deal with a job assignment plan that affected blacks and whites equally. Rather, it dealt with a voluntary affirmative action plan, granting preferences to blacks over more senior whites in admission to a limited craft training opportunity.
30. 555 F. Supp. at 254.
31. *See supra* note 27.

As one turns to the unresolved issue of preferential teacher hiring (and promotion) quotas as remedies for unconstitutional denial of equal educational opportunity for minority students, the stakes are higher, political and philosophical controversy grows, and judicial uncertainty and contradictions multiply.

The Supreme Court has not yet provided clear guidelines for constitutionally permissible, race-conscious hiring (and lay-off) policies in the public sector generally, much less in the area of teacher employment.[32] Thus it is the lower federal courts that have addressed the issue.

Since *Swann* the racial composition of a school system has been accepted as "a useful starting point in shaping a remedy to correct past constitutional violations."[33] But the frame of reference within which the Supreme Court has elaborated on this general and flexible preamble to the shaping of equitable remedies, has been the assignment of an existing student population and teacher corps. The court has not spoken, in desegregation litigation, to the question of increasing the

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32. This term the Supreme Court may finally address some of the issues posed in the many-faceted litigation involving charges of "reverse discrimination" in a public sector employment discrimination suit. *See* Stotts v. Memphis Fire Dep't, 679 F.2d 541 (6th Cir.), *cert. granted*, 103 S. Ct. 2451 (1983). Earlier the Supreme Court avoided resolution of the Title VII and fourteenth amendment challenged to a court order directing that minority firefighters and policemen, who were not victims of past discrimination, be insulated from layoffs. Castro v. Beecher, *sub nom* Boston Police Patrolman's Ass'n, Inc., v. Castro, 103 S. Ct. 2076 (1983) (per curiam) *vacating and remanding* for consideration of mootness.

In 1979, in United Steelworkers v. Weber, 443 U.S. 193 (1979), the Supreme Court upheld, against a Title VII challenge, a *private* sector, voluntary collective bargaining agreement, which provided for racial quotas in access to craft training programs. The Sixth Circuit, in Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981), and Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1978), *petition for cert. filed*, 52 U.S.L.W. 3294 (U.S. Oct. 10, 1983) (No. 83-552), extended Weber's approval of voluntary racial quotas, designed to overcome minority underrepresentation, the the public sector, thus implicating constitutional as well as statutory questions.

In Stotts the Sixth Circuit approved a court-approved and court-modified consent decree providing for hiring, promotion and layoff quotas. The Fifth Circuit, in Williams v. City of New Orleans, 694 F.2d 987 (5th Cir. 1982) held that the district court had abused its discretion in refusing to approve a consent decree because it contained a provision requiring the promotion of one black officer for every white officer until black officers represented 50 percent of supervisory officers in all ranks. Thus, three of the circuits (the First, Sixth and Fifth) that have addressed the issues of hiring and layoff preferences in school desegregation cases, have endorsed minority group preferences in the public employment context, which benefit individuals who are not legally identified victims of discrimination. The Reagan administration's well-known opposition to preferences for persons who are not actual victims of discrimination has been voiced in the Justice Department's efforts to intervene, in several different ways, in each one of the suits. For a brief overview of the Justice Department's involvement, *see* Barbash, *Administration Wages Ban on Quotas*, Was'..ngton Post, Dec. 3, 1983, at A4, col. 1.

33. 402 U.S. at 25.

proportion of minority teachers by means of preferential hiring. Recent decisions involving preferential hiring and layoff policies in the Fort Bend, Boston, Kalamazoo and Buffalo desegregation cases, have, however, split the Fifth, First, Sixth, and Second Circuits respectively. Three times the Supreme Court declined review of the Boston case, *Morgan v. O'Bryant*,[34] both before and after the Sixth Circuit's conflicting decision in *Oliver v. Kalamazoo Board of Education*.[35] In October 1983, the Buffalo Teachers' Federation petitioned the Supreme Court for review of seniority overrides endorsed in *Arthur v. Nyquist*.[36]

Within the framework of Title VII "pattern or practice" employment discrimination litigation, the Supreme Court has held, in *Hazelwood School District v. United States*,[37] that the proper comparison, for the purpose of establishing a prima facie case of employment discrimination is "between the racial composition of [the] teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market."[38] It rejected, as irrelevant and incorrect, a comparison between the proportion of black teachers and black students within the school district.[39] Furthermore, following *Teamsters v. United States*,[40] the Court held that a defendant school district is not in violation of Title VII, even if, before the effective date of the Act,[41] it "maintained an all-white work force by purposefully excluding Negroes," so long as its post-Act employment decisions were made in a "wholly nondiscriminatory way...."[42] From these Title VII theories, several, but not all lower court desegregation cases part company.

Six months following Supreme Court's decision in *Montgomery*, (and two and one-half years before Title VII covered public employment) the Fifth Circuit in *Singleton v. Jackson Municipal Separate School District*,[43] directed the many southern school districts

34. Morgan v. Kerrigan, 388 F. Supp. 581 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied*, 435 U.S. 935 (1976). Morgan v. O'Bryant, 671 F.2d 23 (1st Cir.), *cert. denied sub nom* Boston Ass'n of School Adm'rs and Supervisors, AFL-CIO v. Morgan, 103 S. Ct. 62 (1982), *rehearing denied*, 51 U.S.L.W. 3920 (U.S. June 27, 1983) (No. 82-2124).

35. 706 F.2d 757 (6th Cir. 1983).

36. 712 F.2d 816 (2d Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3344 (U.S. Oct. 20, 1983) (No. 83-665).

37. 433 U.S. 299 (1977).

38. 433 U.S. at 308. Earlier in 1977, in Castaneda v. Partida, 430 U.S. 482 (1977), a case dealing with a system for selecting grand juries, the Supreme Court specified a statistical method for measuring the statistical significance of disparities in minority representation in the relevant comparison groups. 430 U.S. at 496-97, n.17, *cited in* 433 U.S. at 309, n.14.

39. 433 U.S. at 308.

40. 431 U.S. 324 (1974).

41. Title VII did not cover public employment until March 24, 1972.

42. 433 U.S. at 309.

43. 419 F.2d 1211 (5th Cir. 1970), *rev'd in part sub nom* Carter v. West Feliciana Parish School Bd., 396 U.S. 290 (1970).

involved in the consolidated appeal to make hiring and promotion decisions (as well as dismissal and demotion decisions) "without regard to race, color, or national origin."[44] *Singleton's* "color-blind" language was effectively affirmed by the Supreme Court in 1970.[45] In 1972 the Fifth Circuit strayed temporarily from the language and logic of color-blind hiring in *United States v. Texas Education Agency.*[46] Finding a large disparity between the percentage of the faculty who were Mexican-American (3 percent) and the percentage of the school population who were Mexican-American (20 percent), the court held that rigid adherence to the *Swann-Montgomery* principle would be inequitable.[47] The Austin school district was directed to make a good faith effort "to find sufficient qualified Mexican-American teachers to achieve an equitable ratio . . . [which] would rebut any inference of discrimination."[48] An "equitable ratio" was defined in terms of a comparison of the ethnic make-up of the faculty to the racial and ethnic composition of the student population. Even though the Fifth Circuit emphatically stressed that the school board need not lower its employment standards,[49] and proclaimed that the ultimate goal was to apply the faculty racial balance rule, as laid down in *Montgomery* and *Swann*, it had, in fact, voiced one variation on the concept of proportional representation in teacher employment. In *Montgomery* the black-white faculty ratio already "substantially" mirrored the black-white student ratio.[50] Consequently, in that case, the focus on teacher assignments did not broaden into consideration of affirmative action employment goals or quotas.

No reference was made in *Texas Education Agency* to Title VII, only newly made applicable to educational institutions. *Hazelwood's* admonition—that a gross statistical disparity between the racial composition of a school system's teaching staff and that of its student population does not make out a prima facie case of employment discrimination—lay five years in the future. In 1981, five years after *Hazelwood's* admonition, however, the Fifth Circuit was again confronted by the claims of Mexican-American school children and their parents in *Castaneda v. Pickard.*[51] The minority plaintiffs alleged that they had

44. *Id.* at 1218.
45. 396 U.S. 290 (1970). The Supreme Court only reversed the Fifth Circuit's deferral of student desegregation. Singleton was decided soon after Alexander v. Holmes Cty. Bd. of Educ., 396 U.S. 19 (1969), sent Brown II's "doctrine of deliberate speed to its final resting place," 419 F.2d at 1211.
46. 467 F.2d 848 (5th Cir. 1972).
47. *Id.* at 873.
48. *Id.*
49. *Id.*
50. This was the observation of the Fifth Circuit in Texas Education Agency, *id.*
51. 648 F.2d 989 (5th Cir. 1981).

been denied equal protection as a result of discrimination in the employment of Mexican-American teachers. Their claims were premised on the fourteenth amendment, Title VI, and the Equal Educational Opportunities Act of 1974, all of which, the Fifth Circuit ruled, required proof of intentional discrimination.[52] Their claims were not based on Title VII, for they were seeking vindication of the students' rights to equal educational opportunity. Nevertheless, this time the Fifth Circuit held, citing *Hazelwood*, that an order to establish a prima facie case of intentional discrimination in teacher employment, the relevant statistical comparison is between the racial (or ethnic) composition of the teaching staff and the relevant labor market—loosely defined as the "pool of people qualified to fill" the teaching positions.[53] The Title VII model for establishing a prima facie case of intentional pattern or practice discrimination was thus adopted.[54] With *Castaneda* the Fifth Circuit affirmed the right of minority parents and children to challenge discrimination in the hiring (and promotion) of teachers and staff belonging to the same minority. But it discarded the theory of proportional representation suggested in *Texas Education Agency*. It required that in school desegregation litigation, the employees, not just the children, actually be shown to be victims of intentional discrimination.

Since *Castaneda* was remanded in light of *Hazelwood's* requirement that the relevant labor market for teachers must be separately and

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52. *Id.* at 1000-1001. In 1983, in Guardian's Ass'n v. Civil Serv. Comm'n of the City of New York, 103 S. Ct. 3221 (1983) seven justices agreed that Title VI itself requires proof of discriminatory intent. Five justices, however, agreed that Title VI's implementing regulations may validly incorporate a disparate impact standard. Therefore a majority agreed that a Title VI plaintiff can seek injunctive relief, but not damages, for unintentional violations of Title VI and its implementing regulations. There was no opinion for the court.

53. 648 F.2d at 1002.

54. However, the Fifth Circuit did not adopt in entirety the Title VII model for allocating the burdens of proof as set forth most recently in Texas Dep't of Commun. Affairs v. Burdine, 450 U.S. 248 (1980). Burdine reiterated that the ultimate burden of persuading a court that defendant engaged in intentional discrimination lies with the plaintiffs in a Title VII disparate treatment case. The defendant need only rebut the plaintiffs prima facie case by producing "admissible evidence" in support of a defense that its actions were motivated by legitimate nondiscriminatory reasons. It remains for the plaintiff to persuade a court that these reasons are pretextual. In Castaneda v. Pickard, however, the Fifth Circuit, looking to *Swann* and Keyes v. Denver School Dist. No. 1, 413 U.S. 189 (1973), placed a more onerous burden of rebuttal on defendant school districts. They must persuade the court under a "clear and convincing evidence" standard that the challenged employment practices were motivated by legitimate, non-discriminatory reasons, 648 F.2d at 994. Thus, for the Fifth Circuit the ultimate burden of proof in a school desegregation case, in contrast to a Title VII case, rests with the defense. *Cf.*, Evans v. Harrison Cty. Bd. of Educ., 684 F.2d 304 (4th Cir. 1982) (shifting the burden of persuasion to the defendant is proper in employment discrimination case where formerly dual system assigned black principals to black schools and whites to white schools).

distinctly defined from the general population, the Fifth Circuit did not specify what a school district must do in order to achieve a unitary school system. Later in 1981, in *Fort Bend Independent School District v. City of Stafford*,[55] the Fifth Circuit more clearly restated its position on hiring. A school system which formerly engaged in, or arguably engaged in employment discrimination, will be deemed unitary if its current practices "are non-discriminatory and consistent with recommended techniques for sound affirmative action programs."[56] Given the lack of consensus about what constitutes a sound affirmative action program, the *Fort Bend* decision still left some clarity to be desired. Nevertheless, in revisiting *Singleton* it held that neither the fact that a school system has a smaller percentage of minority faculty than it did prior to desegregation, nor the fact that the district has a smaller percentage of minority faculty than the minority student population, precludes a determination that the system is a unitary one.[57]

Given the geography of its jurisdiction, the Fifth Circuit has been the appellate court most extensively involved in school desegregation litigation. Its decision in *Singleton*, reaffirmed in *Fort Bend*, had been upheld by the Supreme Court. Nevertheless, its acceptance (in large measure)[58] of the Title VII frame of reference, its rejection of hiring goals or fixed quotas based on the minority student population, or the minority population of the school district in general, has been rejected in two of the three other circuits that have grappled with the issue.

The First Circuit, in the complex, long drawn-out desegregation litigation involving Boston's public schools, has taken a position on hiring and layoffs which differs most fundamentally from the position of the Fifth Circuit. In 1976 the First Circuit affirmed the decision of the district court ordering the Boston School Committee to hire black and white teachers on a one-to-one basis until the percentage of black faculty reached twenty percent of the total.[59] Once the twenty percent quota had been reached the school committee had an affirmative duty to recruit minority teachers until a figure of twenty-five percent black faculty was achieved.[60] Although the district court concluded that the existing percentage of black faculty could be attributed to

55. 651 F.2d 1133 (5th Cir. 1981).
56. *Id.* at 1136.
57. *Id.* at 1140. *See also*, United States v. Wilcox Cty. Bd. of Educ., 494 F.2d 575 (5th Cir.), *cert. denied*, 419 U.S. 1031 (1974), Lee v. Macon Cty. Bd. of Educ., 482 F.2d 1253 (5th Cir. 1973).
58. *See supra* note 54.
59. Morgan v. Kerrigan, 530 F.2d 431 (1st Cir. 1976), *aff'g* 388 F. Supp. 581 (D. Mass. 1975), *cert. denied*, 426 U.S. 935 (1976).
60. 530 F.2d at 434.

unconstitutional hiring discrimination,[61] the remedy was devised to "make whole" the only judicially identified victims of discrimination—Boston's black school children. The 20 percent goal was based on the black population of Boston. This figure was below the percentage of black students in the school population (35 percent), and well above the percentage of "black college students in Boston or in the Northeast," which, the school committee argued, reflected the "available pool of teachers" (5.25 percent and 4.24 percent respectively).[62] The only Supreme Court school desegregation cases cited by the First Circuit in 1976 were *Swann* and *Green v. County School Board*,[63] the former as to the federal courts' broad and flexible remedial power to fashion remedies in school desegregation cases; the latter for its dictate that segregation and its effects must be eliminated "root and branch."[64] The First Circuit explicitly rejected employment discrimination cases as irrelevant when it discussed hiring goals in its 1982 decision affirming layoff policies granting preferences to blacks. Nevertheless, in upholding the hiring preferences in 1976, it relied on the argument that "the union had done nothing to rebut the natural inference that the ratio of blacks in the appropriate pool . . . roughly reflects the 20 percent figure chosen by the district court."[65] This language was at least loosely related to *Hazelwood*. In 1982, however, the First Circuit added two alternative theories to justify ordering faculty representation in proportion to the black-white presence in the community. The first was the "role model" argument, borrowed from the opinion of the district court in *Oliver v. Kalamazoo Board of Education*,[66] and subsequently rejected by the Sixth Circuit Court of Appeals. Black students need black role models "because they can encourage minority students to higher aspirations and at the same time work to dispel myths and stereotypes about their race."[67] The second might be called the minority community involvement theory. An integrated faculty and staff, one reflecting the racial composition of the community, is "necesary to bring black students and parents fully into the school community."[68]

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61. Morgan v. Hennigan, 379 F. Supp. 410, 456-66 (D. Mass. 1974), *aff'd sub nom*, Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974). The finding of employment discrimination was based, in part, on defendants' over-reliance on the National Teachers Exam (NTE), in spite of their awareness of its disproportionately adverse impact on blacks, and in disregard of studies indicating the NTE did not have substantial predictive validity, 379 F. Supp. at 463.
62. 388 F. Supp. at 582-583.
63. 391 U.S. 430 (1968).
64. *Id.* at 438.
65. 530 F.2d at 434.
66. 498 F. Supp. 732 (W.D. Mich. 1980).
67. Morgan v. O'Bryant, 671 F.2d at 27, *citing* 498 F. Supp. at 748.
68. 671 F.2d at 27.

The hiring quota, and the role model argument the district court used to justify imposition of the quota on Kalamazoo's school system, did not survive on appeal to the Sixth Circuit Court of Appeals. In its 1980 decision, the one cited by the First Circuit in *Morgan v. O'Bryant*, the district court interpreted its 1973 decision as ultimately requiring a staff which, in each of four categories—supervisors, administrators, teachers and counselors—would be 20 percent black.[69] The 20 percent figure was first recommended as a "guideline" in 1969, prior to the initiation of any legal action, by a Citizen's Committee on Integration appointed by the President of the School Board. The 20 percent figure, as far as the Sixth Circuit could determine in 1983, "appeared" to be based on the percentage of black students in the Kalamazoo system in 1968.[70] It exceeded significantly every 1977-78 labor market indicator identified by the court-ordered "Green-Cohen Report":[71] black applicant rate (11.7 percent); black population of Kalamazoo County (5.5 percent); black population of Michigan (9.7 percent); education degrees earned by blacks at Michigan colleges and universities in 1976-76 (10 percent). That the percentage of black teachers in 1977-78 (11.6 percent) met or exceeded the figures did not satisfy the district court, however. It upheld the 20 percent goal as "required" for Kalamazoo to achieve unitary status.[72] The "critical mass" of black teachers and administrators required to insure enough role models could not be achieved with goals based on labor market statistics. For the district court, as for the First Circuit, *Hazelwood* and *Teamsters* were thus utterly irrelevant.[73]

For the Sixth Circuit Court of Appeals, on the other hand, Title VII cases, while not controlling, were not extraneous either. In declaring the district court's 20 percent hiring quota "arbitrary,"[74] the circuit court cited *Teamster*'s caveat that courts "should take practicalities into account in devising remedies under Title VII and in any equitable decree."[75] In spite of vigorous minority hiring efforts, which had raised the black teacher ratio above most labor market indicators, Kalamazoo had not been able to attain the 20 percent goal, "apparently because a

69. 498 F. Supp. at 747.
70. 706 F.2d at 759.
71. This Report resulted from a 1977 order of the district court appointing Dr. Wilbur Cohen and Dr. Robert Green as court experts. They were to evaluate a court-ordered report prepared by the Kalamazoo Board of Education on the implementation of the district court's 1973 desegregation order. Dr. Cohen, former Secretary of Labor, was Dean of the School of Education at the University of Michigan. Dr. Green was Dean of the College of Urban Development at Michigan State University.
72. 498 F. Supp. at 748.
73. *Id.* at 746.
74. 706 F.2d at 763.
75. *Id.* at 762.

disproportionate number of black teachers leave for more lucrative opportunities in the private sector," and because of the high rate of promotion of black teachers to administrative positions.[76]

The Sixth Circuit also repudiated the possibly testable, but unsupported and unanalyzed district court conclusion that the 20 percent quota "represented the 'critical mass' of black role models *necessary* for black students. . . ."[77] Aligning itself in large, although not complete measure with the Fifth Circuit's opinion in *Fort Bend*, the Sixth Circuit, in *Oliver*, held that students "do not have a constitutional right to attend a school with a teaching staff of any particular racial composition."[78] As regards the teaching staff, "all that students are entitled to is the 'sustained good faith effort to recruit minority faculty members so as to remedy the effects of any past discriminatory practices.' "[79] The Kalamazoo Board of Education had satisfied this entitlement with its track record in hiring over a ten-year period; 23.6 percent of "new teacher hires" had been black.

Compared with the various labor market statistics, Kalamazoo's recruitment and hiring results suggested vigorous affirmative action in which race had been given a considerable plus. In *Fort Bend* the Fifth Circuit talked loosely of nondiscriminatory, "sound" affirmative action programs, without reference to any of many conflicting regulations and judicial opinions on the subject. In *Oliver*, the Sixth Circuit cited *University of California v. Bakke*[80] for the greater wisdom of using "flexible" affirmative action programs, which credit minority race a plus, over resort to inflexible quotas.[81] *Bakke*, lacking a majority opinion, has been cited by all sides on the issue of preferential group rights. A head count tally reveals a majority of justices favoring, albeit for different reasons, minority preferences for individuals who, like the teachers in the Kalamazoo case, are not themselves legally identified victims of discrimination. By citing *Bakke*, the Sixth Circuit, far more

76. *Id.* at 762, *citing* 498 F. Supp. at 738, n.4.

77. 706 F.2d at 762. (emphasis added) The circuit court noted that the 20 percent goal was not one of the "Green-Cohen Report" recommendations, *id.* at 763.

78. 706 F.2d 762.

79. *Id.* at 762, *citing* 651 F.2d at 1140.

80. 438 U.S. 265 (1978).

81. 706 F.2d at 757. But the Sixth Circuit did not absolutely rule out quotas per se. A violation of the students' constitutional rights "may be sufficiently egregious to warrant a temporary teacher hiring quota. . . .", 706 F.2d at 763. It was the Sixth Circuit that upheld a voluntary affirmative action plan, giving black patrolmen promotion preferences ahead of white patrolmen on the eligibility list in Detroit Police Officers' Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981). [Hereinafter cited as DPOA] DPOA extended to the public sector the Supreme Court's holding in *United Steelworkers of America v. Weber* that Title VII does not prohibit (in the absence of judicially identified, unlawful discrimination) preferences designed to overcome minority underrepresentation.

clearly than the Fifth Circuit, signals support for preferential minority hiring.[82]

The Fifth Circuit has required, as a remedial predicate for more minority hiring in school desegregation cases, that intentional employment discrimination be shown. The court places a heavier burden of justification on the defendant school system to justify disparities between the proportion of minority teachers and the proportion of minorities in the relevant labor market than is required in Title VII cases.[83] Nevertheless, it has required plaintiff school children and their parents to follow the Title VII (*Hazelwood*) model for establishing a prima facie case of discriminatory hiring.

The First Circuit, on the other hand, has not held that proof of employment discrimination is a prerequisite of judicially-mandated, minority hiring preferences (although the district court found that the Boston School Committee had engaged in racially discriminatory hiring).[84] In conflict with the Fifth Circuit, the First Circuit has discarded Title VII cases as beside the point and held that minority students do have a constitutional right to attend schools with a teaching staff whose racial composition approximates the racial composition of the school district.

The Sixth Circuit, in contrast to the Fifth Circuit, and in accord with the First Circuit, has not held that proof of intentional employment discrimination is a precondition for preferential hiring of minority teachers in school desegregation cases. In the Kalamazoo litigation the district court made no finding of discrimination in teacher hiring prior to 1969 and no one claimed there had been any such discrimination thereafter.[85] In agreement with the Fifth Circuit, and in conflict with the First Circuit, however, the Sixth Circuit rejects the idea that students, who are proven victims of unconstitutional segregation, have a constitutional right to a teaching staff of any particular racial composition. But the Sixth Circuit, unlike the Fifth Circuit, has not ruled out quota hiring per se. Furthermore, the Sixth Circuit, unlike Fifth Circuit has clearly endorsed hiring that takes the minority race very much into account.

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82. *Bakke* involved admissions to competitive graduate education. The only Supreme Court decisions dealing with an employment discrimination claim brought under Title VI is Guardians Ass'n v. Civil Service Comm'n of N.Y.C., 103 S. Ct. 3221 (1983). The outcome suggests Title VI employment discrimination cases, which may be limited to situations in which employees are paid out of federal funds, note 3 *supra*, are likely to parallel Title VII employment discrimination cases. For a discussion of the remedy affirmed in *Guardians Ass'n*, *see* Martha McCarthy's chapter in this book.

83. *See supra* note 54.

84. *See supra* note 61.

85. 706 F.2d at 762 n.2.

Finally, the appellate court that has spoken most recently on the theme of preferential teacher hiring as a remedy for students' rights, is the Second Circuit in the Buffalo desegregation litigation. Its opinion in *Arthur v. Nyquist*[86] yields yet another variation on this unsettled policy question. Along with the First and the Sixth Circuits, the Second Circuit did not hold that proof of discrimination in the hiring of teachers is a precondition for a preferential hiring plan, although the district court had held that the failure of the Buffalo Board of Education to increase the percentage of minority teachers in a meaningful amount, over a ten year period, was an intentional act of discrimination.[87]

In accord with the First Circuit, but not with the Fifth and Sixth Circuits, the Second Circuit approved the district court's order requiring that the Buffalo School Board hire minority and white teachers on a one-to-one basis. Unlike the First Circuit, however, the Second Circuit did not formally rule on the validity of the district court's minority hiring goal—21 percent for Buffalo—since the target figure was not challenged in the appeal.[88] The district court in New York, like the district court in Massachusetts, had fixed the target on the basis of minority presence in "the community at large."[89] Even though the Second Circuit did not rule on this proportional representation remedy, it did not fail to note, citing the Sixth Circuit's opinion in *Oliver v. Kalamazoo* "that other jurisdictions have been *unwilling* to approve teacher quotas based on the percentage of minority students in a school district or on minority population in a municipality."[90]

Given the procedural reason for excluding appellate consideration of the population-based hiring goal, the Second Circuit has not explicitly ruled against the proportional representation concept. Its reference to the Sixth Circuit's position in *Oliver* suggests nevertheless that it would reject it. Its position on the lawfulness of layoff quotas (discussed below), the issue to which the hiring quota was inextricably linked, suggests further, that on the hiring remedy the Second Circuit stands somewhere between the First and Sixth Circuits: according minority race a significant plus through resort to an inflexible quota (one-to-one hiring) is acceptable; both color-blind hiring and color-conscious, proportional representation are rejected, however.

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86. 712 F.2d 816 (2d Cir. 1983).
87. Arthur v. Nyquist, 520 F. Supp. 961, 1963 (W.D.N.Y. 1981), *citing* Arthur v. Nyquist, 415 F. Supp. 904, 944-48 (W.D.N.Y. 1976), *aff'd in relevant part*, 573 F.2d 134 (2d Cir.), *cert. denied sub nom.* March v. Arthur, 439 U.S. 860 (1978).
88. 712 F.2d at 823 n.6.
89. *Id.* at 818.
90. *Id.* at 823 n.6 (emphasis added).

TEACHER LAYOFF POLICIES

Racially or ethnically-based layoff quotas, even more than hiring quotas, pit minorities and whites in a winner-take-all contest. Both determine whether teachers will work, not where they will work, at least within the system subject to desegregation remedies. Among workers accustomed to seniority systems, however, layoff quotas escalate tension further because they attack vested interests. Where seniority systems have framed the rules of a workplace untainted by vestiges of a history of race discrimination, they are perceived as guarantors of fairplay—of freedom from arbitrariness—however unmeritocratic they may be. However, in a workplace tarnished by employment discrimination against racial and ethnic minorities (and women), they perpetrate inequities toward individual discriminatees and can even be crudely anti-meritocratic. In *Franks v. Bowman Transportation Company*[91] and *Teamsters v. United States* (Title VII hiring discrimination cases) and in *Guardians Association v. Civil Service Commission of New York City*[92] (a Title VI hiring discrimination case), the Supreme Court endorsed the use of retroactive seniority to help make identified victims of discrimination whole. They are inserted into their "rightful place" in the seniority ladder because of their personal victimization. These Title VII and Title VI remedies are consistent with an individual rights theory of equal employment opportunity. Competitive status seniority is perfected, not rejected. Such an individualistic approach to employment opportunity is not, however, the operational theory underlying the position of the courts that have endorsed hiring preferences as remedies in school desegregation cases. Hiring preferences are grounded in nonindividualistic, social and psychological theoretical assumptions about the needs of nonemployees—the minority students and the minority community. So are group layoff preferences. To what extent then have the same four appellate courts that have addressed hiring remedies, rejected or accepted group preferences that challenge the very concept of seniority?

In 1979, in *Singleton*, the Fifth Circuit enunicated two principles which were to govern layoffs in school systems undergoing a conversion from completely dual to desegregated systems. First, the court provided that when a reduction in the teaching corps is caused by the process of dismantling a dual system, "dismissals" must be carried out pursuant to "objective and reasonable, non-discriminatory standards."[93] This principle is theoretically consistent with *Singleton's* insistence on

91. 424 U.S. 747 (1976).
92. 103 S. Ct. 3221 (1983).
93. 419 F.2d at 1218.

"color-blind" hiring. It is not necessarily inconsistent with the Fifth Circuit's decision in *Fort Bend*, but in the absence of elaboration on what non-discriminatory practices, consistent with "recommended techniques for sound affirmative action programs" means, uncertainty remains.

The second of *Singleton's* principles governing dismissals required that qualified faculty, black and white, laid off because of desegregation caused, reductions-in-force, have the right of first refusal with respect to subsequent vacancies for which they are qualified.[94] Thus, if a position were to open up for which either a laid off white *or* a laid off black is qualified, it would go to that individual. What would happen if both blacks and whites were qualified was not spelled out. Nevertheless the logic of *Singleton* suggests that seniority could be a principle governing the choice between the white and the black teacher. This is buttressed by the fact that the Fifth Circuit did not extend the reinstatement preference to layoffs not caused by desegregation itself.[95]

In many parts of the Jim Crow south, over which the Fifth Circuit had jurisdiction, many blacks were in the teaching profession in the decades of the fifties and sixties. *Singleton's* principles, if followed in good faith, may not have threatened a severe reduction in the percentage of black teachers. The situation in Boston, in 1981, was clearly different. When a budget crisis forced consideration of "massive layoffs" of teachers, the operation of the collectively bargained seniority principle would have drastically reduced the percentage of black teachers.[96] It had reached 19.09 percent by 1981, not far short of the 20 percent goal ordered in 1975. In 1982 the First Circuit affirmed three principles (articulated by the district court) which were to govern fiscally-caused layoffs. First, the existing percentage of black teachers was to be maintained in order to preserve progress toward the 20 percent target.[97] Second, laid off black teachers were to be given an "absolute preference in recall until the 20 percent goal is reached."[98] These two principles are consistent with the First Circuit's position on hiring. To protect the principle of proportional representation, race must override seniority. Not surprisingly, therefore, the First Circuit explicitly rejected as inapposite the approach to retroactive seniority taken in *Teamsters* and *Franks*, limiting (under Title VII) retroactive awards of

94. *Id.*

95. For a recent reaffirmation of this point, *see* Pegues v. Moorhouse Parish School Bd., 706 F.2d 735 (5th Cir. 1983). *See also*, Cousin v. Board of Trustees, 648 F.2d 293 (5th Cir. 1981); Wright v. Houston Indep. School Dist., 569 F.2d 1383 (5th Cir. 1978).

96. 671 F.2d at 25.

97. *Id.*

98. 671 F.2d at 25 n.3.

seniority to identified victims of hiring discrimination.[99] The teachers hired in Boston, pursuant to desegregation remedies, were not identified victims of hiring discrimination. Nor were they hired to remedy hiring discrimination against other members of their racial group.

By endorsing the third of the district court's layoff principles, the First Circuit made one concession to the expectations which non-black teachers had derived from seniority. The School Committee was temporarily relieved of the 25 percent recruitment goal until all laid off tenured teachers had been recalled.[100] Thus new black hires could not be preferred over displaced tenured whites or tenured non black minorities.

On the subject of hiring and layoff remedies the Fifth Circuit and the First Circuit remain at consistent odds. On layoffs, as on hiring, the Sixth Circuit again parts company with both.

In *Oliver* the Sixth Circuit, like the First Circuit, was faced with a conflict between contractual seniority rights and a district court order nullifying them in order to prevent the layoff of a disproportionate number of minority teachers and a regression from the 20 percent hiring goal. The circuit court acknowledged the benefits and pervasiveness of seniority in the labor field.[101] It drew attention to *American Tobacco Company v. Patterson*,[102] a Title VII case in which the Supreme Court stressed the "overriding importance" of seniority provisions. The Sixth Circuit did not exalt seniority over race, however, and endorse Title VII models. It accepted, in principle, the idea that remedies "necessary" to vindicate students' constitutional rights might require a seniority override.[103] Still, in the Kalamazoo case it rejected completely the district court's nullification of the tenure and seniority rights of white teachers. No evidence was produced to support the district court's "critical mass" role model theory. Hence it had not been shown that a seniority override, designed to protect progress toward the "arbitrary" hiring goal, was "necessary" to protect the constitutional rights of the children.[104] What is more, the district court's order overriding the seniority rights of white teachers did not even meet the Sixth Circuit's concept of reasonableness.[105] This was the less rigorous "standard" the Sixth Circuit had used in upholding a "voluntary affirmative action" promotion plan, in an employment discrimination

99. *Id.* at 27. *See* Martha McCarthy's chapter in this book.
100. *Id.* at 28.
101. 706 F.2d at 763.
102. *Id.* at 763, *citing* 102 S. Ct. 1534 (1982).
103. 706 F.2d at 763.
104. 706 F.2d at 764.
105. *Id.*

suit, in *Detroit Police Officers Association v. Young* (DPOA).[106] The Sixth Circuit distinguished the stakes and circumstances involved in *Oliver*. In *DPOA*, the minority promotion preference, designed to correct what the defendant Police Department had identified as unlawful employment discrimination, could reasonably deprive whites of some promotion opportunities. But unlike the district court's order in *Oliver*, the Police plan did not deprive whites of "vested employment rights."[107] To deprive white teachers of strong and legally established expectations in a school desegregation case not only demanded a showing of necessity. In the absence of evidence supporting the role model theory, and in light of the fact that "the percentage of black teachers after the layoffs . . . , [was] comparable to a number of relevant labor market indicators," it was unreasonable to override the teachers' expectations in seniority.[108]

In *Arthur v. Nyquist* the Second Circuit was faced simultaneously with a challenge to the constitutionality of both the layoff and hiring quotas decreed by the district court. Its position on layoffs, like its position on hiring quotas was again at variance with the other three circuits. The Second Circuit upheld the lower court's mandate that future teacher layoffs be made on a percentage basis, in order to protect "the existing ratio of minority to majority teachers." Thus, in accord with the First Circuit, it abjured the Supreme Court's Title VII cases, holding that bona fide seniority systems—those created and maintained without discriminatory intent—must be honored. The statutory

106. 608 F.2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981). *See* discussion of *DPOA supra* note 32.

107. 706 F.2d at 763-64 n.6.

108. 706 F.2d at 764. The Sixth Circuit's opinion in *Oliver* appears to stand in clear opposition to the decision of the district court for eastern Michigan in Wygant v. Jackson Bd. of Educ., 546 F. Supp. 1195 (E.D. Mich. 1982). Jackson School District's collectively bargained contract stipulated a hiring goal which would achieve minority representation on "each individual staff" of at least the same percentage as the minority representation in the student population, broken down into four minority subgroups, *id.* at 1198. In upholding the contract's layoff provision, which was designed to achieve, or to protect progress toward *Jackson's* version of proportional representation, the *Wygant* court followed the lead of the district court for western Michigan in *Oliver*. This included recourse to its role-model theory, expanded in *Wygant* to encompass the needs of American Indians, Orientals, and persons of "Spanish descendency," as well as blacks, *id.* at 1198, 1201. The *Wygant* court also relied on the Sixth Circuit's decision in *DPOA*, extending *Weber's* holding (*see supra* note 32) to the public sector, that a judicial finding of employer discrimination is not a pre-condition for a lawful, voluntary affirmative action plan containing racial preferences. Although the *Jackson* plan, like the *DPOA* plan, was a voluntary one, and the *Kalamazoo* plan, which the Sixth Circuit rejected, was judically decreed, this difference does not reconcile *Wygant* with the Sixth Circuit's opinion in *Oliver*. The crux of the latter's rejection of the district court's 20 percent quota was that it nullified seniority and tenure rights (which the *DPOA* plan did not) in the absence of support for the argument that a "critical mass" of black role models is *necessary* for black students.

rights of senior, non-minority teachers in Buffalo could be overturned in order to vindicate the constitutional rights of minority children. On the other hand *Arthur v. Nyquist* did not endorse the First Circuit's requirement in *Morgan* that layoff policies must protect the population-based hiring target. The percentage of minority teachers in Buffalo (14 percent), to be protected against layoffs, was well below the 21 percent hiring target the district court had set, and upon which the Second Circuit did not rule.

Finally, the Second Circuit also rejected the First Circuit's approach to the recall of excessed teachers. The First Circuit endorsed an absolute black rehiring preference until Boston reached its 20 percent goal. The Second Circuit, on the other hand, rejected the district court's one-to-one recall order, designed to progress toward the 21 percent goal, which the district court had set for Buffalo. The Sixth Circuit had demanded a finding of "necessity" to justify *any* impairing of seniority-based layoff rights. The Second Circuit, taking a compromise position between the three other circuits, only demanded a finding of "demonstrable necessity" to justify impairing seniority-based rehiring rights.

CONCLUSION

Litigation dealing with employment-related remedies in school desegregation cases, like employment discrimination litigation, is complex, nuance-ridden, and, on the issues of hiring and layoff preferences, contradictory and unresolved.

The only teacher personnel remedy upon which there exists a judicial consensus is that courts may order racial balance in faculty assignments as one remedy for de jure segregated school systems. Possibly this consensus may not extend to a school district's voluntary creation or maintenance of an assignment quota that is not designed to remedy an unlawful imbalance. This is what the district court's opinion in *Kromnick* suggests: an equal employment opportunity challenge to involuntary transfers on the basis of race defeated a school district's policy-making discretion to use assignment quotas a a means of maintaining faculty integration. *Kromnick* is hardly a definitive ruling, however. It ignored *Swann's* support for the exercise of school board discretion, in the absence of a constitutional violation, in an integrative direction. *Kromnick* also glossed over a significant distinction by its reliance on the Supreme Court's decision in *United Steel Workers v. Weber*[109] (which held that Title VII, does not prohibit a *private* sector,

109. 443 U.S. 193 (1979).

race-conscious affirmative action plan.) As the *Kromnick* court noted, the racial quota upheld in *Weber* was a temporary measure designed to correct "a manifest racial imbalance;"[110] it was not aimed at permanently maintaining a racial imbalance. But *Kromnick* downplays the critical fact that *Weber* dealt with preferential rationing of access to scarce training positions. *Weber's* implied rejection of quotas that perpetuate racial balance was directed at perpetuation through ongoing preferences. Philadelphia's race-conscious faculty assignment plan was aimed at maintaining racial balance. But it did not entail racial preferences.

The Supreme Court has never ruled, in a public sector, Title VII employment discrimination case, that hiring, promotion or layoff preferences, designed to protect or advance a racial, gender or ethnic group, may be imposed by court order or a judically-endorsed consent decree.[111] Its Title VII decisions have endorsed remedies which accord relief, including constructive seniority, to judicially identified ("actual") victims of discrimination. Thus, the Supreme Court's public sector Title VII interpretations have remained within the confines of an individualistic conception of legal justice—of giving the individual his or her due under a statutory scheme prohibiting discrimination in employment. The notion of "make whole" relief has been limited to placing the victim of unlawful employment practices in a position he or she would have occupied but for the particular defendant's unlawful discrimination. A number of lower federal courts have moved beyond the conception of justice to the individual in Title VII cases. They have decreed or approved of preferences designed to render "compensatory justice" to groups to which the nonvictim beneficiaries belong.[112] Group preferences, like make whole relief for individuals, are both referred to as remedial. But in the first case they remedy legal wrongs to individuals. In the latter they are designed to remedy the putative or judicially determined, deprived employment status of the preferred protected class. It is not a matter of the individual getting his or her due; the individual beneficiary is proxy for a group, many of whose members are dead and/or too old to have benefitted from Title VII.

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110. *Id.* at 208-209. Since the quota plan was the product of a collective bargaining agreement—hence voluntary—there had been no judicial determination that *Kaiser Aluminum* was guilty of excluding blacks from craft unions. But, the Court pointed out, "[J]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice", *id.* at 198 n.1.

111. *Stotts, supra* note 32, may provide some answers. Unlike *Weber*, which involved a voluntary, private sector plan, *Stotts* involves judicial modification of a consent decree, which created hiring and promotion quotas for minority city firefighters.

112. *See supra* note 32.

Controversy over justice to individuals and compensatory justice to groups, which has raged for years, and remains unresolved in the public employment context, lies beyond the scope of this chapter. It can be suggested, however, that even some advocates of compensatory justice for groups in certain employment contexts might question teacher employment preferences, based on proportional representation concepts, as remedies for segregated schooling.

Like beneficiaries of lower court, Title VII group preference cases, minority teachers who benefit from hiring and layoff preferences are not judicially identified victims of discrimination. But unlike Title VII beneficiaries they are not, in theory, hired and retained to compensate for past employment discrimination against other members of their group. The espoused remedial notion underlying teacher employment preferences is that they will make the minority students—the identified victims of discrimination—whole. They are to be restored to an educational condition they would have occupied but for the defendant school district's unlawful discrimination. But when the target of the minority employment preferences is proportional representation, will they really? This is the general question the Sixth Circuit posed in *Oliver*. It evokes a host of specific questions.

The link between group preferences and group underrepresentation (however determined) in a particular labor force is at least clear in employment discrimination cases. Preferences can alter underrepresentation. But the link between group preferences for minority teachers and the educational opportunity for minority students is far more tenuous, at least when proportional representation is the ultimate goal.

The role model argument is the lead rationale offered to justify a teacher corps that reflects the minority presence in the student population or the school district. As expressed by the district court in *Oliver* and endorsed by the First Circuit in *Morgan*, it was stated as an unsupported, self-evident proposition. For this reason, the Sixth Circuit—the court that upheld minority preferences in employment cases—rejected it.

The notion that many students may be positively influenced by the presence of persons of the same social identity in positions of influence and authority is experientially and intuitively plausible. But it is not at all self-evident what percentage of race-alike or ethnic-alike teachers are necessary to enhance student hopes and aspirations. Indeed, considering heightened public awareness that teaching is lamentably an undervalued, relatively low status professional career, it could just as plausibly be argued that adult minorities raise hopes and aspirations more by entering other, higher status careers.[113] It is not self-evident

113. One explanation for the low status of elementary and secondary school teaching is that it has traditionally been a career for a disproportionate number of professional women and blacks.

that resort to hiring preferences which reject, and are strikingly out of line with labor market indicators will bring about the psychological benefits anticipated. An employment quota that places a far higher premium on race or ethnicity than on personal competence, commitment and empathy risks perpetuation of negative stereotypes among minority and majority students alike, and possibly a decline in the educational opportunity for minority students whom the remedy is supposed to make whole. It is not self-evident that all minority parents, treated as an undifferentiated class for legal purposes, in fact believe proportional representation of race-alike or ethnic-alike faculty is necessary to meet their childrens' pressing educational needs.

Finally, two ironies of resort to racial quotas to achieve proportional representation in teacher employment deserve comment. One is that it reveals an attitude that underestimates the skill and training required for excellence in teaching, which is what educational opportunity is presumably about. Courts may treat elementary and secondary school teachers as an undifferentiated bevy of certified or certifiable college graduates, but they rarely treat faculty in higher education or other professions in the same way.

Another irony of a proportional representation remedy is that, in the name of integration within one school system subject to desegregation litigation, a court may end up reinforcing the racial identifiability of regional school systems. Boston, with its large and growing proportion of poor minority school children is ordered to engage in aggressive minority recruitment efforts. What does that do for the racial composition of the faculty in white and more affluent Brookline, Belmont, Arlington and Newton? They are under no similar judicial mandate. If they voluntarily initiate sustained, good faith minority recruitment efforts, they must, to some degree, come into competition with Boston. Their students, then, lose the opportunity for greater exposure to teachers of different races. Viewed from a broader perspective than a single system lawsuit, proportional representation employment remedies hoist integrationists on their own petard. To question the merits of striving for proportional racial or ethnic representation in a teacher corps is not to deny that race, ethnic (or gender) alike role models raise student hopes and aspirations.[114] Accepting the idea that racial and ethnic pride merits recognition in the employment process does not, however, support magnifying it out of proportion by mandating proportional representation.

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114. Personal but unsystematic observations suggests there is some merit to role model arguments. There is little systematic research on the multifacted concept, however. *See, e.g.*, Speizer, *Role Models, Mentors and Sponsors: The Elusive Concept*, 6 SIGNS 692 (Summer 1981).

To question the merit of striving for proportional representation in a teacher corps does not entail, on the other hand, unqualified acceptance of seniority systems. For all their benefits, seniority systems nevertheless exalt longevity over individually measured competence, and thus weaken the professionalism of elementary and secondary school teaching. Where minorities are overrepresented among new, as compared to older hires, seniority-based layoffs have a disproportionately adverse impact on minority teachers, thus counteracting efforts to expose students (of all races) to a racially and ethnically diverse teaching faculty. Regretably, in both the desegregation cases discussed in this chapter, as well as in most employment discrimination litigation, policy options are cast narrowly in terms of an inevitable conflict between race and seniority.[115] Presented, in litigation, with traditional and deeply prized, last-hired, first-fired seniority provisions, courts have failed to consider ways of diminishing their negative consequences to minorities and to the quality of an educational system. But there are policy options which, in many instances might mitigate, if not obviate the conflict between race and seniority. *Early* and *phased* retirement policies, based on voluntary incentives for older faculty to leave employment, are two. Because of the voluntary character of these policies, they do not challenge the concept of seniority-based entitlement. They can facilitate retrenchment with dignity to older faculty. They can open up opportunities for "new blood" (of all ages) to enter the system. They can serve the interest of racial justice and educational quality by opening opportunities for minorities and by protecting them against involuntary reductions in force that disregard their merit and their contributions as role models.

Voluntary existing incentives cannot guarantee that racial justice, quality, social harmony and dignity will always be served simultaneously. Much depends on the age profile of a particular teacher corps, and obviously, the extent of the financial inducements to phase down or to retire. Courts, however, could do worse than consider, in the factual context of each desegregation case, creative alternatives to the race versus seniority dilemma with which they are presented and which they have not resolved. By drawing attention to early and phased retirement policies, courts might open minds to the limitations of seniority in a society scarred by a history of discrimination, without engaging in a frontal assault on the "pervasive" system of seniority itself.

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115. Thus the title of Professor Hooker's commentary on the *Boston* and *Kalamazoo* cases. Hooker, *Seniority v. Race: A Case For Both Sides in School Layoffs*, 12 EDUC. LAW REP. 617 (1983).